Supreme Court, U. S.
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IN THE

United States Supreme Court

OCTOBER TERM

No. 75-1279

HENRY ESTEVA,
Appellant

-vs-

EDWARD F. BOARDMAN,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

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March 3, 1976

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Florida which became final and effective on January 6, 1976 and which reversed the judgment of the Florida District Court of Appeal, First District, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Florida which was entered on September 30, 1975, rehearing denied on January 6, 1976, is reported in 323 So.2d 259 and appears in Appendix A, infra, pages 1 through 25. The opinion of the Florida District Court of Appeal, First District, was entered on June 11, 1974, rehearing denied September 19, 1974, is reported in 299 So.2d 633 and appears in Appendix B, infra, pages 1 through 9.

JURISDICTION

This suit was brought to contest the certified results of an election involving irregularities under the Florida Absentee voting statutes, Florida Statutes Sections 101.62 through 101.694 inclusive. Suit was filed in the Circuit Court for the Second Judicial District of Florida. The Trial Court ruled against appellant on October 2, 1973; the Florida District Court of Appeal reversed and declared appellant the winner of the election on June 11, 1974, rehearing denied on September 19, 1974; the Supreme Court of Florida reversed the District Court of Appeal in its opinion entered on September 30, 1975, rehearing denied on January 6, 1976. Notice of Appeal was filed on January 7, 1976 in the Florida Supreme Court. The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on direct appeal in this case: *Huffman vs. Pursue, Ltd.*, 95 S. Ct. 1200; *Brinkerhoff-Faris Trust and Savings Co. vs. Hill*, 281 U.S. 418; *Lawrence vs. Mississippi State Tax Commission*, 286 U.S. 276; *Herndon vs. State of Georgia*, 295 U.S. 441; *International Union, et al vs. Russell*, 356 U.S. 634; *Local 438, et al vs. Curry*, 371 U.S. 542; *Bantam Books vs. Sullivan*, 372 U.S. 58.

APPEALABLE QUESTIONS PRESENTED

1. Whether Section 101.68 of the Florida Absentee Voting Statute which prescribes the manner of counting absentee ballots, as sustained by the Florida Supreme Court where in a public election the absentee ballots were coded in one county on instigation of the then attorney for the appellee here, so that it could be determined for whom each elector cast his absentee ballot, and the holding of the Florida Supreme Court that by voting absentee the elector waives the secrecy of his ballot, is repugnant to Article IV, Section 4 of the United States Constitution and to 50 U.S. Code, Section 1473.

2. Whether the ruling of the Florida Supreme Court sustaining the validity of Florida Statute, Section 101.041, where in a public election the absentee ballots were coded in one county on instigation of the then attorney for the appellee here, so that it could be determined for whom each elector cast his absentee ballot, and the holding of the Florida Supreme Court that by voting absentee the elector waives the right of secrecy of his ballot, is repugnant to Article IV, Section 4 of the United States Constitution and to 50 U.S. Code, Section 1473.

OTHER FEDERAL QUESTIONS INVOLVED

3. Whether the taking of jurisdiction and the reversal of a judgment of the Florida District Court of Appeal by the Florida Supreme Court when the judgment of the Supreme Court shows on its face that it lacked jurisdiction under the Florida Constitution, constitites a denial of Federal rights under the Fourteenth Amendment to the United States Constitution.

4. Whether the holding of the Florida Supreme Court in receding from the established rule of law of strict compliance with the absentee voting statutes and in changing the rule to "substantial" compliance after a multi-county election contest, where some of the 18 different county canvassing boards invalidated ballots under the then existing strict compliance rule and which ballots were either lost or destroyed and could not be validated under the newly established rule of "substantial" compliance, constitutes retrospective and ambiguous law and a denial of rights under the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

Florida Statutes, Section 101.041; 101.65; 101.68 and 101.691, are set forth in Appendix C hereto and Article V, Section 3 (b) 3 of the Florida Constitution is set forth in Appendix D hereto.

STATEMENT OF THE CASE

The case involved an election contest for a seat on the Florida District Court of Appeal, Second District. The District covered 18 counties, each with its own canvassing board which determined the validity of ballots and certification of returns. Esteva, appellant here won the total machine vote by 404 and appellee, Boardman, had a majority of 653 of the absentee ballots certified by the various county canvassing boards, thus giving Boardman a net majority of 249 votes. Esteva brought suit in the Circuit Court for the First Judicial District of Florida, to invalidate all absentee ballots on the grounds that the number of void ballots that should not have been counted exceeded Boardman's net margin of victory and thus under Florida law all absentee ballots are invalidated and the election decided on the machine vote. The alleged void ballots included irregularities by the electors such as failure to indicate one of the prescribed reasons for voting absentee and failure of proper authentication and attestation, and the violation of the secrecy of the ballot on instigation by the attorney for appellee, Boardman, whereby ballots were coded so that it could be determined how each elector voted. (See original record, original complaint filed, p. 8, and exhibits thereto, pps. 12-21).

The Trial Court ruled that the violation of secrecy did not warrant invalidation of the ballots, that there were only 88 absentee ballots that should not have been counted, and sustained the certification of Boardman as the election winner. The Florida District Court of Appeal reversed the Trial Court, finding irregular ballots far in excess of the 249 net majority for Boardman. The Florida Supreme Court took "tentative" jurisdiction by granting Boardman's Petition for Writ of Certiorari on November 26, 1974 and on September 30, 1975, it entered and filed its opinion changing the rule of law from strict compliance with the Florida Absentee voting statute to "substantial" compliance, and refusing to invalidate absentee ballots where the right of secrecy was violated, holding that one who votes under the Florida Absentee voting statute waives the right of secrecy of the ballot. The total of these ballots together

with the 88 which the Florida Supreme Court held should have been invalidated, are in excess of the number required to invalidate all absentee ballots under Florida law. Appellant filed a petition for rehearing on October 1, 1975 (the day after the entry of said judgment) which was denied on January 6, 1976.

The Constitution of the State of Florida vests final appellate jurisdiction of cases appealable from the State Circuit Courts in the District Courts of Appeal, except that under certain specified circumstances the Florida Supreme Court may review by certiorari, decisions of the District Courts of Appeal. The only constitutional grounds on which the Writ of Certiorari was petitioned and granted was that there was conflict between the decision of the District Court of Appeal and other existing decisions of the Supreme Court. The decision of the Florida Supreme Court in reversing said decision shows upon its face that, in fact, there was no conflict and therefore, the Florida Supreme Court was without jurisdiction to enter said putative judgment.

The appealable questions involved in the violation of the secrecy of the ballot were first raised in the original complaint filed by the appellant with copies attached thereto of the judicial proceedings wherein the coding of absentee ballots in the County of Hillsborough was done so the authorities could determine for whom each elector cast his ballot. The Trial Court refused to invalidate those ballots. The Florida District Court of Appeal held that it was not necessary to rule on this point because there were other invalid ballots far in excess of the net majority, the number necessary to invalidate all absentee ballots. The Florida Supreme Court held that by voting under the Florida Absentee voting act, the elector waived the right of secrecy of the ballot and that said ballots were not invalidated because of the violation of secrecy.

The Federal question involving the usurpation of jurisdiction by the Florida Supreme Court could not be anticipated and did not arise until that court entered its opinion and the appellant raised it as timely and expeditiously as

possible in his Petition for Rehearing which was filed the day after the entry of the judgment. The Florida Supreme Court denied the Petition for Rehearing. In addition to having filed this appeal, the appellant here also filed suit in the United States District Court for the Northern District of Florida, Tallahassee Division, on the grounds that the said usurpation of jurisdiction by the Florida Supreme Court and the order adverse to the appellant herein, constituted a violation of his rights under the Ninth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. Sections 1983 and 1985 (3). The cause was dismissed on the grounds that the court lacked jurisdiction and that this, the United States Supreme Court was the only court with power to review the judgment of the Florida Supreme Court. A copy of said ORDER OF DISMISSAL appears in Appendix "E".

The Federal Question involved in the judicial change after a multi-county election from the rule of strict compliance to "substantial" compliance with the absentee voting statute was raised by appellant in the original complaint and throughout all proceedings and appeals in the assertion and demand that any ballot which did not comply with then existing strict compliance rule must be invalidated. The Trial Court followed the "substantial" compliance rule, the Florida District Court of Appeal followed the strict compliance rule and the Florida Supreme Court followed the "substantial" compliance rule.

THE QUESTIONS ARE SUBSTANTIAL

(Appealable Questions Nos. 1 and 2)

Article IV, Section 4 of the United States Constitution provides that every state shall have a republican form of government. There can be no republican form of government when the government can ascertain how electors voted. The Federal Absentee Voting Assistance Act of 1955, 50 U.S. Code, Section 1473, provides:

> "Every individual concerned with the administration of this chapter shall take all necessary steps to prevent fraud, to protect voters against coercion of any sort, and *to safeguard the integrity and secrecy of ballots cast.*" (emphasis supplied)

The holding by the Florida Supreme Court (in the face of the Federal Constitution and the Federal Absentee Voting Assistance Act) that an elector in a public election who votes under the Florida Absentee Voting Statute waives the right of secrecy of his ballot, constitutes solid basis for appeal to the United States Supreme Court. See *Huffman vs. Pursue, Ltd.*, 95 S. Ct. 1200 and *Bantam Books vs. Sullivan*, 372 U.S. 58. It is respectfully submitted that such a flagrant violation of one of the most critical safeguards of the bed rock of democracy — the secrecy of the ballot — mandates corrective action by this court.

OTHER FEDERAL QUESTIONS

(Question No. 3)

The question of whether the Florida Supreme Court's jurisdiction to review decisions of the Florida District Courts of Appeal, is discretionary or constitutionally restricted, is of utmost importance in ending the chaos and the denial of rights and equal protection under the Fourteenth Amendment to the U.S. Constitution which exists under the present uncertainty as

to when an appeal to the Florida District Courts of Appeal is final. This court held in *Local No. 438, et al vs. Curry*, 371 U.S. 542, that it had the power to review the question of whether the Supreme Court of a state had acted without jurisdiction. To the same effect, *International Union, et al vs. Russell*, 356 U.S. 634 and in the *Brinkerhoff-Faris Trust and Savings Co. vs. Hill case*, 281 U.S. 673, Justice Brandeis in the opinion held that the Federal question of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.

As stated above, appellant sought to have this question resolved in the Federal District Court, however, that court denied jurisdiction holding that this, the United States Supreme Court, was the only court with jurisdiction over the question.

(Question No. 4)

The question involved in the changing after an election of the rules by which absentee ballots were validated, is of course, of great importance because of the matter of those ballots which were invalidated under the then existing rule of strict compliance. The Florida Supreme Court's judicial retroactive establishment of the rule of "substantial" compliance in a multi-county election thus created a double standard constituting a violation of rights under the Fourteenth Amendment to the U.S. Constitution and a disfranchising of electors whose ballots were invalidated under the then existing strict compliance rule. This court held in *Lawrence vs. Mississippi State Tax Commission*, 286 U.S. 276 at page 282, that "it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided." (citing cases)

All questions were timely raised, the violation of the secrecy of the ballot, and that of adherence to the rule of strict compliance with the absentee voting statute to insure

uniformity, were raised in the complaint and throughout the proceedings. The question involving usurpation of jurisdiction by the Florida Supreme Court could not be anticipated and was timely raised by Petition for Rehearing filed the day after the entry of the putative order, which under such circumstances has been held sufficient by this court. See *Brinkerhoff-Faris Trust and Savings Co. vs. Hill*, 281 U.S. 418 and *Herndon vs. State of Georgia*, 295 U.S. 418.

Finally, it is submitted that there are no state grounds on which the judgment of the Florida Supreme Court can rest and a reversal of that judgment is warranted under any one of the Federal questions presented.

Respectfully submitted,

LEO L. FOSTER, ESQUIRE
Attorney for Appellant

HENRY ESTEVA (pro se)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari, have been furnished, Air Mail Postage Prepaid, to each of the following to the Honorable Joseph C. Jacobs and to Robert J. Angerer of the law firm Ervin, Varn, Jacobs & Odom, P. O. Box 1170, Tallahassee, Florida 32302 and to the Honorable J. Michael Hayes of the law firm Gregory, Cours, Paniello, Johnson & Hayes, P. O. Box 3346, Tampa, Florida 33601 on the 31 day of March, 1976.

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APPENDIX A

Edward F. BOARDMAN, Petitioner,

v.

Henry ESTEVA, Respondent.

No. 46282.

Supreme Court of Florida.

Sept. 30, 1975.

Rehearing Denied Jan. 6, 1976.

Candidate brought suit seeking to be declared winner of election on basis of machine vote only and to have election declared illegal in respect to absentee ballots cast. The Circuit Court, Leon County, dismissed and contestant appealed. The District Court of Appeal, First District, 299 So.2d 633 reversed and certiorari was

7. Petition of Wolf, 257 So.2d 547, 549 (Fla. 1972); *In re Dawson*, 131 So.2d 472, 474 (Fla.1961).

8. *In re Dawson*, *supra* note 7.

9. Fact finding in disciplinary matters should not be overturned unless wholly lacking in

filed. The Supreme Court, Adkins, C. J., held that, in absence of indication that absentee ballots were not cast by qualified registered voters who were entitled to vote absentee, presumption of correctness of election officials' returns counting such ballots stood, and that where circuit court required county canvassing board to assign a number to each absentee elector to maintain integrity of absentee ballots for judicial review, the order was entered subsequent to actual casting of absentee ballots, ballots were not invalidated on theory of violation of right of secrecy.

Decision of District Court of Appeal quashed and cause remanded with instructions to reinstate and affirm judgment of trial court.

Overton, J., concurred with an opinion.

England, J., concurred specially to conclusion with an opinion.

Williams, Circuit Judge, concurred specially with an opinion.

J. Michael Hayes, Gregory, Cours, Paniello, Johnson & Hayes, Tampa, and Joseph C. Jacobs and Robert J. Angerer, Ervin, Varn, Jacobs & Odom, Tallahassee, for petitioner.

Leo Foster, Tallahassee, and Henry Esteva, in pro. per., for respondent.

ADKINS, Chief Justice.

On petition for certiorari, we have for review a decision of the First District Court of Appeal in *Esteva v. Hindman*, 299 So.2d 633 (Fla.App.1st, 1974), which allegedly conflicts with this Court's decision in *State ex rel. Hutchins v. Tucker*, 106 Fla. 905, 143 So. 754 (1932). The source of our jurisdiction is Fla.Const., art. V, § 3(b)(3), F.S.A.

This is a contest of the October 3, 1972, election for a seat on the Second District Court of Appeal, in which the petitioner, Boardman, was declared winner over respondent, Esteva. Although Esteva received 404 more machine or regular votes than did Boardman, the latter received 653 more absentee ballots, for an overall majority of 249 votes. This dispute solely involves the validity of the 3,389 absentee ballots cast in the election.

Esteva brought suit in the Circuit Court for the Second Judicial Circuit seeking to have the court declare him the winner of the election on the basis of the machine vote only, and to have the election declared illegal in respect to the absentee ballots cast. Although no fraud or wrongdoing was charged, Esteva alleged that there

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were some 1450 irregularities or errors in the absentee ballots. Therefore, since 250 votes for Esteva could change the result of the election and it was impossible to identify for whom the illegal ballots had been cast, the ballots being commingled, the absentee ballots should be thrown out. The trial judge, after considering the pleadings, admissions, affidavits and other matters on file, together with arguments of counsel for the respective parties and their briefs, granted summary judgment for Boardman, finding that of the 1450 alleged flaws, only 88 set forth a real basis to conclude that the ballots were illegal. Among these were 13 in which the application was not signed by the applicant, 17 in which return envelopes were not signed across the flap, 39 in which the official title of the subscribing witness was not indicated and 19 in which the names of the electors were not on record.

The trial court concluded that the remainder of the alleged irregularities involved a number of "clerical misprisions or omissions, most of which are of so little real significance as to be fairly classified as unsubstantial." For example, the court found:

> "(d) There are shown 16 in which the reason for voting absentee was not specifically indicated on the application and 79 in which such reason was not indicated on the return envelope. Each of these forms contains the five categories of persons who may vote absentee with instructions to 'check appropriate reason'. Failure to put a check mark into one or more of those designations is not deemed fatal to the validity of the ballot. The signature of the elector is adequate to at least certify that one or more of the reasons is applicable and in the case of the certificate on the return envelope it is under oath. Even if these are to be counted illegal they would not change the results.
>
> "(e) The other irregularities, such as address of attesting witness omitted, post office cancellation stamp not affixed, vague identification of witnesses, failure of deputies to record oath, and the other discrepancies are not of vital consequence and may be attributed more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements. Fraud, corruption or gross negligence are completely absent.
>
> "(f) The plaintiff urges that all absentee votes of Hillsborough County, of which Esteva received 133 and Boardman 320, must be suppressed because they were counted and returns made in accordance with an injunction order of the Circuit Court of Hillsborough County in the case of *Levine, et al. v. Falsone, et al.*, constituting the Canvass Board, Case No. 213299. It is contended that such procedure ordered by the Court violated F.S. 101.68 and other statutes and breached the fundamental requirement of secrecy. This Court does not interpret the Hillsborough Circuit Court order as having that effect and has not overlooked *Papy v. Englander*, Fla.App. (Third) 267 So.2d 111. However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order, and will make no judgment except to approve the obedience of the election officials to its commands and to accept their returns pursuant thereto."

On appeal, the District Court reversed, declaring Esteva the winner of the election. After concluding that the "Florida courts have long maintained and restated the principle that strict compliance with the statutory requirements for absentee voting is mandatory," the District Court held:

> "Thus far, we have shown irregularities sufficient to invalidate 612 absentee votes cast in this election. These include the 88 found by the trial court, the 16 in which no reason for voting absentee was indicated on the application, the 79 in

which no such reason was indicated on the return envelope, and the 429 in which the envelopes were lost in Polk, Hendry and Glades counties. There are numerous other errors and omissions shown by appellant, such as vague identification of witnesses and omission of post office cancellation stamps and addresses of witnesses. Furthermore we have grave doubts as to the validity of the Hillsborough County Canvass of absentee ballots which numbers 453, with regard to the fundamental requirement of the secrecy of the ballot. However, we do not deem it necessary to rule on these other alleged irregularities in light of our conclusion that the irregularities found are sufficient in number to affect the results of this election."

At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot.

We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Notably existent in this dispute is the complete absence of any allegation of fraud, gross negligence or even the hint of intentional wrongdoing, either on the part of the voters or of the election officials Assuming that the absentee ballots counted in the election were cast by qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects, a majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

In 1932 we first considered the construction of the absentee voting law. In *State ex rel. Hutchins v. Tucker, supra*, we held that several ballots had been illegally rejected and should have been counted where there had been a substantial compliance with the provisions of the absent voting statute.

Tucker was apparently overlooked seven years later when we made the statement in *State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 192 So. 819 (1939), that the rigidity of its (absent voting statute, Ch. 16986, Acts of 1935) enforcement is an open question in this State. We held in *Rinehart* that, being in derogation of the common law, the absentee voting laws should be strictly construed. At issue in *Rinehart*, was the validity of certain absentee ballots allegedly cast by electors who were in the city on election day and other ballots cast by unregistered and unqualified citizens of some other state. These alleged defects directly affected the sanctity of the ballot, and would indeed have been held invalid under *Tucker's* substantial compliance test.

Frink v. State ex rel. Turk, 160 Fla. 394, 35 So.2d 10 (1948), held that the absentee voting statute must have a strict interpretation. We said that the failure to comply with the clear language of the statute to the effect that the elector must swear in his application for absentee ballot that he expected to be absent from the county and not just the city on election day rendered the ballot of no effect. We also said that the Legislature did not merely suggest a form of affidavit, but specifically stated in detail the substance and manner of its execution in Fla.Stat. § 101.07, 1941, F.S.A.[1]

The strict interpretation rule was reaffirmed in the subsequent cases before this Court,[2] however, not without exceptions. In *State ex rel. Titus v. Peacock*, 125 Fla. 810, 170 So. 309 (1936), decided after *Hutchins* but before *Frink*, we held that an erroneous or unlawful handling of otherwise valid absentee ballots by election officials will not void the ballots, provided the votes were legal in their inception and still capable of being given proper effect as such. This principle was reaffirmed in *Jolley, supra*, in 1952, thus etching an exception to the general rule of strict interpretation of absentee voting laws.[3]

[1] Without further analysis of the case law, and realizing as we do that strict compliance has been required by this Court in other cases, we now recede from that rule and hereby reaffirm the rule adopted in *Tucker* to the effect that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot. We offer no opinion as to the validity of the ballots found to be invalid in the prior decisions had they been measured by the substantial compliance standard.

[2] Originally absentee voting statutes were directed at making the voting privilege available to those engaged in military service. *Rinehart, supra*. Therefore, absentee voting was considered a privilege granted to electors, not an absolute right. *Frink, supra*. The purpose of the enactment of absentee voter statutes, therefore, was to enable a qualified voter to vote at a general election in the precinct of his domicile were he temporarily absent therefrom. Times obviously have changed, however, since the absentee voting laws were first enacted in Florida in 1917. We are no longer in the horse and buggy age. Society is much more mobile today and in fact depends to a great extent upon its mobility for survival. Regardless of the original reasons for the enactment of the absentee voter laws, they must be interpreted in light of modern conditions. This does not require a full scale re-enactment of the law. That is for the Legislature to do, and in fact the statute has been amended several times over the years. But the mere fact that a statute was enacted in 1917 does not require us to interpret it with a turn-of-the-century perspective. Although the conve-

1. It is interesting to note that Fla.Stat. § 101.07, 1941, F.S.A., strictly interpreted in *Frink*, was amended in the legislative session immediately following our rendering of *Frink*. See § 1, Ch. 25385, 1949 Laws of Florida. At the time *Frink* was decided § 101.07 required the county clerks to furnish a ballot which, *inter alia*, included an oath to be taken and subscribed to by the elector. The oath was spelled out in the text of the statute. The amended version, § 1, Ch. 25385, 1949, in addition to other changes in the statute, prescribed a new form of oath for the application. However, instead of requiring the specific oath prescribed in the statute, as we determined was the legislative intent in *Frink*, the new version simply required the execution of an oath in *substantially* the same form prescribed therein. This part of the statute remains unchanged.

2. *Jolley v. Whatley*, 60 So.2d 762 (Fla.1952); *Griffith v. Knoth*, 67 So.2d 431 (Fla.1953); *Wood v. Diefenbach*, 81 So.2d 777 (Fla.1955); *Parra v. Harvey*, 89 So.2d 870 (Fla.1956); *McDonald v. Miller*, 90 So.2d 124 (Fla.1956).

3. In *Titus*, we cited 9 R.C.L. § 102, pp. 1093-1095, as well as *Hutchins*, for support of the exception we mention here. Although the cited paragraph does not refer to absentee ballots or statutes, it does make the pertinent observation that:

"In short, a fair election and honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end, and the law should be so construed as to remedy the evil against which its provisions are directed and at the same time not to disenfranchise voters further than is necessary to attain that object." 9 R.C.L. § 102, pp. 1093-1095.

nience of the voter may not have been one of the considerations for the enactment of the absentee voting law (*Rinehart*), it would be naive of us to fail to recognize that the accommodation of the public has become the primary basis for the privilege of voting absentee. The Legislature of Florida recognized this when it amended the statute to provide absentee voting for persons who may be absent from the county on election day or who are physically unable to make it to the polls, or who may be prevented by their religious beliefs from voting on a particular day. See Fla.Stat. § 101.62(3), F.S.A.

[3, 4] In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, *a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will.* Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, *provided such irregularity is not calculated to affect the integrity of the ballot or election.* Fla.Stat. § 101.67(3), F.S.A., for example, declares that the absentee ballot shall be counted only where the "application for absentee elector's ballot" is properly executed and placed in an envelope separate from the absentee ballot. It is clear, therefore, that the Legislature intended that any application not so properly executed and separated from the ballot must not be counted. This does not mean, however, that insignificant omissions or irregularities appearing on the application form suggested in Fla.Stat. § 101.62, F.S.A., must void the ballot where the information that does appear on the application is sufficient to determine the qualifications of the applicant to vote absentee, and the omissions or irregularities are not essential to the sanctity of the ballot. The Legislature did not define what it meant by the term "properly executed," nor did it say that the application form suggested in Fla. Stat. § 101.62, F.S.A., had to be strictly complied with.[4] To the contrary, Fla.Stat. § 101.62, F.S.A., states that the application shall be in substantially the same form as that found in the statute. On the other hand, the Legislature has clearly mandated that if the absent elector's ballot is not placed in an envelope separate from the absentee ballot, as required by Fla.Stat. § 101.67(3), F.S.A., the ballot will in no event be counted.

Absolute strict compliance, even with mandatory provisions in every case, however, could reach absurd proportions. For example, under a former version of Fla. Stat. § 101.64, F.S.A., an elector who certified that he would be absent from the State on election day would not have strictly complied with the statutory requirement that the elector certify his intention to be absent from the county on election day. Could it seriously be doubted that such an elector failed to state his intention to be absent from the county? Yet, his ballot would have been void under the strict compliance rule. *Frink, supra.*

4. Although not controlling here, we note that in the Legislative session subsequent to this contested election, Fla.Stat. § 101.67, F.S.A., was amended in two interesting particulars. First, the elector is no longer required to restate on the elector's certificate his reason for voting absentee, although the elector must state that he or she is voting absentee for the reason stated in the application for absentee ballot. Second, no longer is the elector required to fill in the number of the precinct

323 So.2d—17½

in which he or she is registered to vote on the elector's certificate. That is now the duty of the election official. At the very least the Legislature has by these amendments recognized the repetitiousness of the information appearing on the two forms for the application and elector's certificate. We feel that the Legislature has also recognized that certain items previously required to be complied with are not essential to the sanctity of the ballot.

[5, 6] It is true that the absentee voting statutes are in derogation of the common law and therefore must be strictly construed. Strict construction, however, does not necessarily mean strict compliance. In *Brown v. Grzeskowiak*, 230 Ind. 110, 101 N.E.2d 639 (1951), the Supreme Court of Indiana agreed that absentee voting laws are generally strictly construed. The Court then said:

"Even though such statutes do, under certain circumstances, extend a special privilege to those who may be away from their voting place on election day, *it must be kept in mind, even when applying the rules of strict construction, in ascertaining the meaning of the language used together with the intent of the Legislature, that the will of the majority of those who have legally voted is the thing to be most desired.* (Emphasis ours.)

. . . . . .

"'The purpose of the law and *the efforts of the court* are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disenfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.'" *State ex rel. Harry v. Ice*, 207 Ind. 65 at 71, 191 N.E. 155, at 157 (1934). (Emphasis theirs.)

"Since the Legislature has extended the privilege to certain voters who may be absent from their voting places on election day, to cast their ballots, even though absent from the polling place, the same effort must be made to extend to them an opportunity to freely and fairly cast their ballots and to prevent their disfranchisement as is made to protect the ballots and prevent the disfranchisement of those voters who are present at their voting place and cast their vote in person.

"The ultimate question for determination in an election contest is, who has received the highest number of legal votes? (citation omitted.)" 101 N.E.2d at 647.

In applying a liberal interpretation to the absentee voter law, the Indiana Court noted that the intention of the Legislature, as ascertained from a consideration of the Act as a whole, would prevail over the literal meaning of any of the terms used in the statute. We agree. Consistent with the Indiana Court's reasoning is our decision in *Wilson v. Revels*, 61 So.2d 491 (Fla.1952), where we considered the legality of certain machine votes and a group of absentee ballots. The contested machine votes were not signed by the electors as required by law, but their names were written on the ballot stubs by the election officials, and the absentee ballots had been mistakenly placed in the wrong ballot box, although they were easily distinguishable from the other absentee ballots. Justice Terrell wrote for the Court:

"There is no charge of fraud or intended wrong in handling the ballots. The ground of appellant's contention is, that the absentee ballots were void because of irregularities pointed out in handling them, and that the regular ballots were void because the electors failed to sign stub number 1. The chancellor found, and the record discloses, that Liberty is a small county, that at least one of the electors (sic) knew personally each elector whose vote is challenged; that the names of the electors were written on the stub by members of the election Board after the elector was identified, and that the registration of all electors was checked before the ballot was delivered. No elector asked to sign stub number 1 and both the electors and the Canvassing Board acted without fraud, deception or purpose to conduct other than a fair election.

"It is not suggested or contended that the result of the election would have been different if the law had been tracked to the letter, nor is it suggested that the integrity of the election was affected by the way the ballots were handled. It is contended that to permit such practice to go unchallenged, opens the

door for fraud and corruption of the ballot. This court is not unmindful of the truth of this contention, and, if there were any suggestion whatever of fraud or that the irregularities were purposely done to foul the election or corrupt the ballot, it would not be permitted to stand." 61 So.2d 491, at 492.

This result was reasonable and proper. The facts are similar in some degree to the situation *sub judice*. Here we are dealing with several small counties in which the record shows that the election officials personally knew many of the voters whose ballots were allegedly invalid because of complained irregularities, such as lack of complete address of the voter on the application or return envelope, or lack of a precinct number. The record also shows that in many cases the voter simultaneously made application for the absentee ballot and cast his vote while in the office of the election officials, and that many of the voters were well known to the election officials. Although we recognize that we were dealing primarily with regular machine votes in *Wilson*, it would be stretching the law to unreasonable lengths to conclude that the result should be different in this case simply because we are dealing with absentee ballots. What is important in both cases is the absence of fraud or any wrong suffered from the irregularities complained of, and the fact that the will of the people was effected. *Wilson*, *supra*.

[7] In expanding the privilege of voting to those citizens who may not be able to vote in person on election day, the Florida Legislature has prescribed statutory requirements which are intended to insure that those who vote are qualified and registered to vote and that they do so in a proper manner. There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with? Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot. See reference to the case of *Attorney General ex rel. Miller v. Miller*, 266 Mich. 127, 253 N.W. 241, quoted with approval by this Court in *Jolley*, *supra*. See also, *Anderson v. Budzien*, 12 Wis.2d 530, 107 N.W.2d 496 (1961), where the Wisconsin Supreme Court, holding that the legislative intent in enacting the absentee voter statutes is to encourage and assist qualified voters to cast their ballots for candidates of their choice, recognized that in order to prevent fraud the Legislature specifically stated that in some instances there must be strict compliance with the statute or a ballot cannot be counted. However, the Court said that where the Legislature has not so expressly provided for strict compliance, any provisions are directory and strict compliance therewith is not required. Accord, *McMaster v. Wilkinson*, 145 Neb. 39, 15 N.W.2d 348 (1944), where the court cited our decision in *Rinehart*, *supra*, for the rule of strict construction of absentee voting laws, and then held:

> "It is the policy of the law to prevent as far as possible the disfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set forth in the absentee voting law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required." 15 N.W.2d, at 353.

Some of the errors alleged in *McMaster* were similar to some of those alleged here. Although some of the ballots were invalidated as a result of the errors, in other cases the court held that although the statute had not been strictly complied with, where there had been substantial compliance the absentee ballots were valid. For example, 21 ballots were held to be valid although the title of the election officer did not appear on the ballot next to the officer's signature as required by law. However, a ballot was declared void where the notary failed to fill out the elector's certificate identifying the voter.

[8] Having decided that substantial compliance with the requirements of the absentee voting statute is all that is required to give legality to the absentee ballots, we now turn to the remaining issues. First, there is the question of the 429 missing outer envelopes containing the statutorily required absentee voters' affidavits, which were either lost or destroyed by the canvassing boards in Glades, Hendry and Polk counties. It is not alleged that any of the ballots were in fact defective, rather it is contended that since the return envelopes containing the ballots cast by the voters were not preserved by the election officials as required by Fla.Stat. § 101.68(1), F.S.A., thus defeating any judicial review of the ballots, then all the ballots should be thrown out. But even if we agreed with this contention and required all the ballots to be thrown out, it would not necessitate the invalidation of all the absentee ballots cast, even though the number (429) would be more than enough to change the result of the election. The general rule is that where the number of invalid absentee ballots is more than enough to change the result of the election, then the election shall be determined solely upon the basis of the machine vote. *Frink*, *supra*. The reason for the rule is that since all the ballots have been commingled and it is impossible to distinguish the good ballots from the bad, because all ballots are required by law to be unidentifiable, then in fairness all the ballots must be thrown out. In other words, it is impossible to tell for whom the invalid ballots were cast since they were commingled with the valid ballots. The rule is not applicable here because the outer envelopes for *all* of the absentee ballots in these three counties were lost. Therefore, assuming that all the ballots were invalid due to the missing envelopes, there is no problem with distinguishing the good ballots from the bad because they all would be bad. Therefore, even if we invalidated all 429 ballots because of missing envelopes, we would only be required to reduce the total number of votes cast for petitioner and respondent rather than throw out all the absentee ballots cast. These 429 have not been commingled with ballots from other counties. The result would be that the 292 votes Boardman received in those three counties would be subtracted from his total and the 137 votes Esteva received from those three counties would also be deducted from his total, still leaving Boardman with an overall majority of 94 votes.

[9-13] As to the actual validity of the ballots whose return envelopes are missing, we first point out that as a general rule elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary, *City of Miami Beach v. Kaiser*, 213 So.2d 449, 453 (Fla.App.3d, 1958), and also that there is a presumption that returns certified by election officials are presumed to be correct. *Burke v. Beasley*, 75 So.2d 7 (Fla.1954). This is because the canvassing of returns, including absentee ballots, is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots. When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions. *Titus v. Peacock*, *supra*. It is not contended by respondent that the absentee ballots in question were illegally cast or that they were cast by voters who were unqualified to vote absentee. The burden is clearly on the contestor to establish that the ballots have been irregularly cast. *Burke*, *supra*. There is nothing in the record to indicate that the absentee ballots in question were not cast by qualified registered voters who were entitled to vote absentee, therefore, the presumption of the correctness of the election officials' returns stands.[5]

5. We agree with the trial court's observations that:

[14–17] Turning to the question whether the procedure utilized in canvassing and counting the absentee ballots in Hillsborough County violates the requirement of secrecy, thus invalidating all the absentee ballots cast in that county, we hold that it does not. It has long been recognized in this State that by voting absentee the elector waives the secrecy of his ballot. *Hutchins, supra.* Likewise in *McDonald v. Miller, supra*, we held that the privilege of secrecy is personal to the voter, and if he so desires may waive it. Although we do not suggest that there has been a personal waiver of an individual voter's right to secrecy here, we make the following two observations. First, it is not contended that the privilege of secrecy was violated in the actual casting of the ballots by the voters. Rather, it is contended that the order entered by the Hillsborough County Circuit Court in *Levine, et al. v. Folsone, et al.*, Case No. 213299, opinion filed October 7, 1972, requiring the Hillsborough County Canvassing Board to assign a number to each absentee elector for purposes of maintaining the integrity of the ballots and votes for purposes of judicial review, which order was entered subsequent to the actual casting of the absentee ballots on October 3, 1972, enabled the election officials to determine which voter voted for which candidate. We emphasize that it has not been contended that the voters were in any way influenced in their voting by the order in question or that they even were aware of it. Nor is there any allegation that a violation of secrecy has actually occurred. This was nothing more than an honest attempt to preserve the integrity of the ballot in case the election was contested. Our second observation is that we are not at all convinced that either petitioner or respondent has standing to raise the issue of violation of secrecy of the ballot. Being personal to the voter, the right of secrecy may be waived by the voter and it would appear that the voter himself is the only party who has standing to protest a violation of the right to vote in secret. We therefore conclude that the absentee ballots cast in Hillsborough County were not invalidated by reason of a violation of the right of secrecy of the ballot.

[18, 19] In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots cast, the following factors shall be considered:

(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;

(b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and

(c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

The underlying concern of the election of-

> ". . . The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. The canvassing of returns, including absentee ballots, is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots. Those judgments are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law. Such is not the case here and this Court deems action by it to change the result which the proper officers have reached would be meddlesome interference not sanctioned by proper judicial functions." Final Summary Judgment, *Esteva v. Hindman*, Case No. 72–1481, opinion filed October 2, 1973, Second Judicial Circuit.

ficials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner. The substantial compliance test used by the trial judge comports with our conclusion that strict compliance with the statutory requirements for absentee balloting is not required to validate the ballots. Since the trial court found only 88 ballots to be invalid, petitioner Edward F. Boardman is hereby declared the winner of the October 3, 1972, election for the Second District Court of Appeal by a total of 161 votes.

Therefore, the decision of the District Court of Appeal, First District, is quashed. This cause is remanded to the District Court of Appeal with instructions to reinstate and affirm the judgment of the trial court.

It is so ordered.

ROBERTS, J., and CHAPPELL, Circuit Judge, concur.

OVERTON, J., concurs with an opinion.

ENGLAND, J., concurs specially to conclusion with an opinion.

WILLIAMS, Circuit Judge, concurs specially with an opinion.

OVERTON, Justice (concurring).

I have been strict in the exercise of our conflict jurisdiction. A reading of the election contest cases concerning absentee ballots reveals a maze of confusing doctrines and rules. There are cases to sustain the position of both sides. The following are cases which may be asserted to sustain the validity of the critical absentee ballots: *McDonald v. Miller*, 90 So.2d 124 (Fla.1956); *Burke v. Beasley*, 75 So.2d 7 (Fla.1954); *Jolley v. Whatley*, 60 So.2d 762 (Fla.1952); *State ex rel. Hutchins v. Tucker*, 106 Fla. 905, 143 So. 754 (1932). On the other hand, the following cases may be asserted to invalidate the absentee ballots: *Parra v. Harvey*, 89 So.2d 870 (Fla.1956); *Wood v. Diefenbach*, 81 So. 2d 777 (Fla.1955); *Griffin v. Knoth*, 67 So.2d 431 (Fla.1953); *Frink v. State ex rel. Turk*, 35 So.2d 10 (Fla.1948); *State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 192 So. 819 (1940); *Spradley v. Bailey*, 292 So. 2d 27 (Fla.App.1st 1974); *Papy v. Englander*, 267 So.2d 111 (Fla.App.3d 1972).

Our role in conflict jurisdiction is to stabilize the law by a review of decisions which form patently irreconcilable precedents. *Florida Power & Light Co. v. Bell*, 113 So.2d 697 (Fla.1959). The aforementioned cases are impossible to reconcile.

In my opinion, we also have jurisdiction because the instant decision of the District Court accepts earlier decisions of this Court as controlling precedent in a situation which is materially at variance with the instant case. *See McBurnette v. Playground Equipment Corp.*, 137 So.2d 563 (Fla.1962). The instar case concerns an 18-county election. The District Court decision invalidates all absentee ballots in all 18 counties by applying the rule that: ". . . [W]here the number of illegal absentee ballots cast is sufficient to change the result of an election, none of the absentee ballots cast in the election will be accepted and counted. . . ."[1]

In all the cases cited for this rule, invalid ballots were commingled with valid absentee ballots and the elections concerned only a single county or municipality. Neither of these facts is present in the instant case. In my opinion, this is a material variance.

The strict application of the District Court's decision could have a devastating effect on the inclusion of absentee ballots in close statewide races. I am deeply concerned, as is Judge Williams, that the practical application of the District Court's decision would void all absentee ballots in ev-

1. *Esteva v. Hindman*, 299 So.2d 633, 637 (Fla.App.1st 1974).

ery close multi-county election which had the result changed by absentee ballots. A candidate who won a close election on the machine vote but lost when absentee ballots were counted would only have to find defective election procedures in one or two counties involving enough total ballots to change the result in order to void *all* absentee ballots.

In conclusion, I agree with the trial judge that common sense and a reasonable application of the statute requirements in absentee ballots must be applied. It is important to recognize that in the instant case there is no allegation or suggestion of any fraud, corruption, or other intentional misconduct on the part of either candidate or the election officials in the several counties and districts involved. Purity of the ballot must be maintained, and opportunities for fraud and interference with the ballot must be discouraged. Strict application of the rule adopted by the District Court might well encourage absentee ballot interference.

I concur in the majority opinion.

ENGLAND, Justice (concurring specially):

I agree with Chief Justice Adkins that the trial court's judgment should be affirmed.

WILLIAMS, Circuit Judge (concurring specially).

In the consideration of this cause, I was concerned to find that the most recent decisions in Florida appeared to resolve the law on questioned absentee ballots in favor of strict compliance of the statutes, even on some insignificant details, and further in favor of discounting all absentee ballots where the number of illegal ballots are sufficient to change an election, even in a large multi-county or multi-district election where the various counties' ballots are kept separately and not commingled. I agree with the observations of the trial judge in this case wherein he observed in Paragraph 5 of his judgment that if the pronouncements in the Woods and Parra cases are to be applied without regard to the particular facts in those cases it is doubtful that any close election which is decided by absentee votes in an area equal to or larger than the Second District could be sustained.

I am particularly concerned that if the decision of the First District Court of Appeal in this case were to stand as the law of Florida in elections, corruption might be encouraged. Fortunately, in this case there is no hint of corruption or evil intent on the part of any one involved in this case. I only speak of possibilities in the future. Almost all elections, to all intents and purposes, are decided by the machine vote which is usually counted on the evening of the election or in the early hours of the following morning. The absentee ballots are not counted until at least many hours after the machine vote has been counted and announced. Therefore, the counting of the absentee ballots usually becomes a mere formality. Only in close elections may the absentee ballots make the difference in the election results, and then as a kind of proceeding after the fact of the "regular" election.

Let us consider a hypothetical situation as follows: in which there is an election for a judgeship in a district or circuit encompassing several counties; in which an election worker or official is involved in processing or counting votes; in which such official or worker is interested in one of the candidates in the election either through friendship, politics, or other close relationship; in which such official or worker's candidate appears to be the winner by a close vote after the count of the precinct or machine ballots. In such a situation it would appear to me that it might be very easy for such an official or worker to immediately destroy a sufficient number of ballots, destroy the outer envelopes of a sufficient number of ballots, or do any one of a number of acts which would involve a number of absentee ballots; such number comprising more than

the margin by which his favorite candidate has apparently won the machine count. Thereby, without even knowing the contents of the ballots or caring, he immediately makes certain that his candidate has won the election. He has thus, personally and at very little risk, disenfranchised all persons who voted by absentee ballots and has thereby possibly himself decided the outcome of the election. It is bad enough that one such person is able to disenfranchise the voters in his particular county, but being able thereby to disenfranchise the voters in all of the counties in the election is unconscionable.

In the case before us there were 3,389 absentee ballots counted and returned by the Canvassing Boards of 18 counties. In each of 4 counties there were enough absentee ballots that, if invalidated, could invalidate all absentee ballots in all the counties, under the decision of the District Court of Appeal, and some prior decisions upon which its ruling was based. Such interpretation of law should be repudiated by this Court.

On one point I disagree with the trial judge and agree with the District Court of Appeal. I am not in favor of going too far in the substantial compliance application. Certain of the statutory requirements must be complied with and to be too generous in the application of the substantial compliance theory would again encourage corruption by inclusion of bad ballots. In adddition to the 88 ballots found to be illegal by the trial court, I would agree with the District Court of Appeal, that all of those ballots in which the reason for voting absentee was not specifically indicated either on the application or on the return envelope should be barred.

Such a requirement goes to the very eligibility of the voter to cast an absentee ballot, and, if deemed reasonable to the legislature, should not be vetoed by us, which we in effect would do by overlooking the omission of the voter. These ballots add up to at most 95. (The record does not indicate whether or not the reason for voting absentee was indicated on one but not the other. It would be sufficient if the reasons were indicated in either place.)

For reasons stated by the trial judge and by Justice Adkins in his Opinion, I agree that the 453 absentee ballots of Hillsborough County and the 429 absentee ballots from Glades, Hendry and Polk Counties, are valid. The substantial compliance rule is even more applicable to actions of public officials than to the errors or omissions of the voters themselves. Voters should not be disenfranchised by the actions of public officials after proper count and certification and before a contest of the election. The improper ruling of the court in Hillsborough County which resulted in a breach of the secrecy of the ballots should not disenfranchise the electors of Hillsborough County even though instigated by one of the parties who, for ought that appears in the record, did so in good faith, in attempting to protect his interest and to preserve a true count of ballots.

APPENDIX B

Cite as, Fla.App., 299 So.2d 633

Henry ESTEVA, Appellant,

v.

Tosie HINDMAN et al., Appellees.

No. U-260.

District Court of Appeal of Florida, First District.

June 11, 1974.

Rehearing Denied Sept. 19, 1974.

Election contest in which contestant appealed from a final summary judgment entered by the Circuit Court, Leon County, Ben C. Willis, J., dismissing the action. The District Court of Appeal held that in order to qualify as an absentee voter it is mandatory that the elector indicate in writing his reason for voting absentee, and absentee ballots as to which no such indication was given were void, that absentee ballots should not be counted where all of the return envelopes were lost after the votes were canvassed, and that, where number of illegal absentee ballots cast was sufficient to change result of election, none of the absentee ballots cast would be accepted and counted, and election would be determined upon the machine or precinct vote count.

Reversed.

Leo Foster, Tallahassee, and Henry Esteva, St. Petersburg, for appellant.

Joseph C. Jacobs of Ervin, Varn, Jacobs & Odom, Tallahassee, and J. Michael Hayes of Gregory, Cours, Paniello & Johnson, Tampa, for appellees.

PER CURIAM.

This is an election contest initiated by appellant who was declared the unsuccessful candidate for the office of Judge of the Second District Court of Appeal of Florida. For the reasons hereinafter set forth, we are compelled to reverse the final summary judgment rendered by the trial court which dismissed the action initiated by appellant with prejudice.

Appellant Henry Esteva received a majority of 404 machine votes over his opponent, appellee Boardman, in the election for the office of Judge of the Second District Court of Appeal. When the 3,389 absentee ballots were counted, Boardman had edged ahead by 249 votes. No contention has been made as to the correctness of the votes cast via the voting machines, and this entire controversy involves the validity of the absentee ballots cast in this election.

The trial court found that of the some 1450 flaws and defects which the appellant has detected, only 88 set forth "a real basis to conclude that the ballots so cast may have been illegal." These 88 fall into four categories; to wit: the application for an absentee ballot was not signed by the applicant; the return envelope was not signed across the flap; the official title of the witness was not indicated; and the names of the electors were not on record. We could certainly agree that such ballots were illegal as being in flagrant violation of the statutes governing absentee voting. F.S. §§ 101.62 through 101.691, F.S.A. Our point of departure from the rationale of the trial court comes with the holding therein that failure to indicate the reason for voting absentee on the application form and the return envelope and failure to preserve the return envelopes were not deemed fatal to the validity and purity of the ballots cast.

[1] F.S. § 101.62, F.S.A., sets forth the form of an application blank for an absentee ballot. Said form sets out the five legal reasons for voting absentee and the applicant is to check one of these as his reason for so voting. Unless the voter qualifies to vote by absentee voting by indicating in writing on the application for the ballot at least one of the five reasons for such absentee voting, the ballot becomes

a nullity. F.S. § 101.63, F.S.A., provides that upon receipt of the application for absentee ballot, filled out and signed, it shall be filed and a list or card file kept of applicants to whom a ballot has been sent. F.S. § 101.64, F.S.A., provides for the manner and procedure of preparing and delivering the ballots to persons on the list provided for in § 101.63 and provides that an outer return envelope shall be included bearing a certificate. This certificate is in essentially the same form as the application blank, requiring the elector to again state his reason, by checking one of the five printed statutory grounds, for voting absentee.

In order to qualify as an absentee voter, it is mandatory that the elector indicate in writing his reason for voting absentee. Parra v. Harvey, 89 So.2d 870 (Fla.1956).

The trial judge found that in his opinion there were 88 illegal votes cast. In Paragraph 2(d) the trial judge also found 95 ballots in which the absentee voters had failed to follow the statute by checking the appropriate reason for voting absentee, but the trial judge said that he determined such failures to follow the statute were not fatal to the validity of the ballots so cast. This is contradictory to all the Supreme Court of Florida decisions rendered, we believe, since 1955, as will be more fully discussed hereinbelow.

In Parra v. Harvey, supra, the Supreme Court of Florida pointed out that "On four applications no witnesses signed while 14 were signed by only one witness. Clearly these applications were not complete and could have formed no foundations for valid ballots."

In the pleadings and evidence before the trial judge, there were more than enough illegal ballots, when gauged by the law as set forth in Parra v. Harvey, supra, that would affect and in fact change the results of the election. There must have been some valid reason for the Legislature enacting the provisions of the statutes granting authority to vote absentee and setting the guidelines which must be followed in order to vote validly absentee, and we think that the appellant has demonstrated enough illegal ballots which would turn the election results into his favor.

The certificate mandated by F.S. § 101.64, F.S.A., further requires the signature of the elector as well as the signature of an attesting witness, with his official title and address. A postal officer is required to apply his station cancellation stamp to this return envelope. § 101.64 also provides that "the absent elector and the attesting witness shall *execute* the said *form* on the envelope." F.S. § 101.65, F.S.A., sets forth the substantial form of instructions to be sent with each absentee ballot. Said form states: "*Fill out* the 'Elector's Certificate' on the back of the envelope, sign . . . ." F.S. § 101.66, F.S.A., provides that the absent elector shall, in secret, mark his ballot, *follow the instructions enclosed with his ballot*, etc. F.S. § 101.67, F.S.A., provides, inter alia, that the supervisor shall deliver the envelopes, along with his list kept regarding said ballots, to the canvassing board and again reiterates the requirement that the application for absentee ballot be properly executed. F.S. § 101.68, F.S.A., provides for the method of canvassing absentee electors' ballots. The canvassing board is to compare the ballots presented to it with the list or card file required by § 101.63 and is to compare the information on the back of the envelope to see that the elector is duly registered, has not already voted, and to *determine the legality of the absent elector's ballot*. If it is determined that any vote is illegal, the face of the return envelope is to be so marked. Such envelopes and the ballot contained therein are to be preserved.

We have set forth the relevant portions of these statutes to illustrate that the Legislature has carefully promulgated specific procedures and safeguards to insure the integrity and purity of the absentee ballot. It cannot be doubted that such ballots, as compared with those votes registered on a voting machine, are susceptible to widespread abuse. For this reason, our Leg-

islature has prescribed in detail the procedure which must be followed by the voter and the procedure to be followed by election officials in receiving, counting and preserving the ballot after it has been delivered.

[2] Absentee voting was unknown to the common law. It is a privilege conferred by statute. Being in derogation of the common law, statutes which authorize absentee voting should be cautiously and specifically followed. Much attention must be given by the voter, as well as by those charged with the responsibility of receiving and counting votes, to a ballot cast by a voter, not personally, but by the substituted manner permitted by statute. The Florida Courts have long maintained and restated the principle that strict compliance with the statutory requirements for absentee voting is mandatory. State ex rel. Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 (1940); Frink v. State ex rel. Turk, 160 Fla. 394, 35 So.2d 10 (1948); Jolley v. Whatley, 60 So.2d 762 (Fla.1952); Griffin v. Knoth, 67 So.2d 431 (Fla.1953); McDonald v. Miller, 90 So.2d 124 (Fla.1956); Pappy v. Englander, 267 So.2d 111 (Fla.App. 3rd, 1972). In Wood v. Diefenbach, 81 So.2d 777 (Fla. 1955), it was recognized that compliance with the statutory requirements for absentee voting is mandatory and failure to so require is fatal to the ballot cast. And, as stated in Parra v. Harvey, 89 So.2d 870 (Fla.1956):

> "The statutes with reference to absentee voting must be strictly applied because they are not designed to insure a vote but rather to permit a vote in a manner not provided by common law."

And again, in Frink v. State ex rel. Turk, supra, 35 So.2d at 12, the Court, in referring to a provision of the absentee voting statutes, stated:

> ". . . The statute here must have a strict interpretation because: First, the statute was not enacted to grant the right to vote but rather to serve as a means to vote in a manner not recognized at common law; Second, the privilege was granted by the legislative body with full consciousness of its constitutional responsibilities for the ballot. The language of the statute is clear and the failure to comply with it renders the ballots of no effect. It is not a case of disfranchising a voter; he failed to comply with the law and for that reason his ballot was properly rejected."

With these statutory and judicial guidelines in mind, we now turn to the irregularities in the absentee ballots cast in the subject election. In addition to the 88 ballots found to be illegal by the trial court, there were found to be 16 in which the reason for voting absentee was not specifically indicated on the application for ballot and 79 in which such reason was not indicated on the certificate on the return envelope. However, it was concluded that failure to designate the reason was not fatal to the validity of the ballot because "the signature of the elector is adequate to at least certify that one or more of the reasons is applicable and in the case of the certificate on the return it is under oath." This is not the law nor is it what the statute provides. If the signature alone were adequate to certify that the elector had a valid reason for voting absentee, there would be no reason whatsoever for the statutory forms for application and for the certificate on the return envelope as provided by F.S. §§ 101.62 and 101.64, F.S.A., nor would there be any sense to the language in § 101.63 pertaining to the application being *filled out* and signed or the language in § 101.65 pertaining to the *filling out* and signing of the elector's certificate.

The trial court's opinion speaks of these and other discrepancies which "may be attributed more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements." It is further concluded in paragraph 5 that "strict construction of statutory requirements does not demand utter frustration when minor lapses occur,

not disruptive of reasonable safeguards, which do not impair the integrity of the ballot of a qualified elector fairly cast." We do not consider the failure to indicate one of the five statutory grounds for voting absentee to be a "minor lapse." If an elector does not have a valid ground for casting an absentee vote, he simply may not do so. To allow him to do so would, in our opinion, disrupt the safeguards intended to surround such voting and would impair the integrity of the ballot. That the Courts of this State have not deemed a failure to indicate a legal reason for voting absentee a mere oversight or technical misprision is clear from the cases of Frink v. State ex rel. Turk, supra; Griffin v. Knoth, supra; and Parra v. Harvey, supra. In those cases, the Florida Supreme Court held that applications stating that the applicant expects to be absent from the city or the municipality on the day of the election, instead of the statutory language, "I *will* be absent from the *county* . . ." were improper and ballots based thereon could not be counted. The Court further stated in Parra v. Harvey, supra, that when an elector disregards statutory provisions that he should follow to make his ballot regular in all particulars, he will not be heard to claim that his ballot should be counted because he was innocent, due to ignorance of the law or indifference to its provisions.

[3, 4] Turning now to the 429 absentee ballots cast, of which appellee Boardman received a majority of 155, in the counties of Glades, Hendry and Polk, it is our opinion that these too should not be counted for the reason that all of the return envelopes were lost after the votes had been canvassed. We base this conclusion on the grounds stated above and also upon the ground that the parties to an election contest are entitled to have proof of the validity or the invalidity of the votes cast under the absentee voters statutes. Opportunity must be afforded to interested parties to interpose objections to an absentee ballot. By failing to preserve the certificated return envelopes, there was no opportunity for either candidate to insure that the ballots cast were legal. While there is case authority for the proposition that erroneous or even unlawful handling of the ballots by election officials will not be held to disfranchise absentee voters, these cases have specifically confined their rulings to votes which were legal in their inception and voters who have themselves fully complied with the provisions of the statutes. For example, in State ex rel. Titus v. Peacock, 125 Fla. 810, 170 So. [illegible] (1936), we find the following:

> "The rule is general that, if ballots have been cast by voters who were, at the time, qualified to cast them, and such voters had at the time done all on their part that the law required the voters to do to make their voting effective, an erroneous or even unlawful handling of the ballots by the election officers charged with such responsibility will not be held to have disfranchised such voters by throwing out their votes on account of erroneous procedure had solely by the election officers, *provided the votes were legal votes in their inception, and are still capable of being given proper effect as such.*" (Emphasis supplied.)

Due to the unavailability of the return envelopes containing ballots cast in Polk, Hendry and Glades Counties, there is no way possible to determine if the votes cast were legal in their inception. There is no way to determine if said votes were timely received, if they were signed by the elector, if the elector had a valid reason for voting absentee, if another person witnessed the signature of the voter or even if the names of the electors were on record.

There may have been votes counted which, if viewed by the contestants and/or the court, may have been illegal when gauged by the same rule of construction as found by the trial judge in paragraph 2(c) of his final summary judgment concerning the 88 illegal votes cast.

In short, there was no method of determining if the essential safeguards guaranteeing the purity of the absentee ballot were complied with, and such ballots should not have been counted.

Thus far, we have shown irregularities sufficient to invalidate 612 absentee votes cast in this election. These include the 88 found by the trial court, the 16 in which no reason for voting absentee was indicated on the application, the 79 in which no such reason was indicated on the return envelope, and the 429 in which the envelopes were lost in Polk, Hendry and Glades Counties. There are numerous other errors and omissions shown by appellant, such as vague identification of witnesses and omission of post office cancellation stamps and addresses of witnesses. Furthermore, we have grave doubts as to the validity of the Hillsborough County canvass of absentee ballots, which numbered 453, with regard to the fundamental requirement of the secrecy of the ballot. However, we do not deem it necessary to rule on these other alleged irregularities in light of our conclusion that the irregularities found are sufficient in number to affect the results of this election.

[5] It is the settled rule of this State that where the number of illegal absentee ballots cast is sufficient to change the result of an election, none of the absentee ballots cast in the election will be accepted and counted, and the election will be determined upon the machine or precinct vote count. See Griffin v. Knoth, supra; Parra v. Harvey, supra; Spradley v. Bailey, 292 So.2d 27 (Fla.App. 1st, 1974) and cases cited therein. It is only necessary that 250 votes be found invalid in order to affect the results of the instant election, inasmuch as Boardman was declared to be the winner by 249 absentee votes. The number of illegal absentee ballots as found from the pleadings being far in excess of 250, it is our conclusion that the election for Judge of the Second District Court of Appeal should be determined by the votes registered on the machines of which appellant Esteva received a majority of 404.

Accordingly, the final summary judgment appealed herein is reversed. Due to the length of time which has elapsed since the election and the filing of this appeal, we see no reason to remand this cause to the trial court for further proceedings, and we hereby declare appellant, Henry Esteva, to be the winning candidate for Judge of the Second District Court of Appeal.

Reversed.

JOHNSON, Acting C. J., SPECTOR, J., and DREW, E. HARRIS, Retired, Associate Judge, concur.

APPENDIX C

Florida Statutes Involved

101.041 — Secret voting

"In all elections held on any subject which may be submitted to a vote, and for all, or any, state, county, district or municipal officers, the voting is by secret, official ballots, printed and distributed as provided by this code, and no ballot shall be received or counted in any election, except as prescribed by this code. Only those provisions of this law which are consistent with the law governing primaries, shall apply to primaries and, only those provisions of this law which are consistent with the law relating to the use of voting machines shall apply to voting machines."

101.65 — Instructions to absent electors

"The supervisor shall enclose with each ballot sent to an absent elector separate printed instructions furnished by him containing substantially the following:

(1) Upon receipt of the enclosed ballot you will mark the same according to the instructions, then detach stub No. 2 bearing the initial of the supervisor from the ballot. Place only the marked ballot in the enclosed plain envelope and securely seal it, and then place stub No. 2 and sealed plain envelope in the second envelope addressed to the supervisor. The application blank properly filled out shall be mailed in a separate envelope from the ballot envelope. Fill out the "Elector's Certificate" on the back of the envelope, sign, and have the envelope signed by an attesting witness, place the necessary postage upon the envelope, and deposit it in the post office or in some government receptacle provided for the deposit of mail, or deliver it to this office so that absent elector's ballot will reach the supervisor of the county in which your precinct is located not later than 7 p.m. on the day of the election. However, no absentee ballot shall be issued after 5 p.m. on the day preceding such election.

(2) Any notary public, United States postmaster, assistant United States postmaster, United States postal supervisor, United States postal superintendent of mails, United States postal clerk in charge, clerk in charge of a contract postal station, or any officer having authority to administer an oath or take an acknowledgment may be an attesting witness. If a

postmaster, assistant postmaster, postal supervisor, postal superintendent, postal superintendent of mails, postal clerk in charge, or clerk in charge of a contract postal station acts as an attesting witness, his signature on the elector's certificate must be authenticated by the cancellation stamp of their respective post offices. If one or the other officers named acts as attesting witness his signature on the elector's certificate, together with his title and address but no seal shall be required.

(3) Any affidavits made by an absent elector, who is in the armed forces, may be executed before a commissioned officer, warrant officer or noncommissioned officer not lower in grade than sergeant or its equivalent navy rating, or any person authorized to administer oaths."

101.68 — Canvassing of absent elector's ballot

"(1) The supervisor of the county where the absent elector resides shall receive the voted ballot and shall safely keep the ballot unopened in his office until the board of county canvassers canvasses the vote according to law. The canvassing board shall begin the canvassing of absentee ballots not later than noon on the day following the election. The canvassing board shall compare the ballots presented to it by the supervisor for canvass with the list or card file required by 101.63, so as to compare the number of ballots in its possession with the number of applications for ballots received to be counted according to the supervisor's file or list to insure all the absentee ballots to be counted by the canvassing board are accounted for. The canvassing board shall compare the information on the back of the envelope with the registration book to see that the elector is duly registered in the precinct and has not voted on election day and to determine the legality of the absent elector's ballot. If it is determined by the canvassing board that any vote is illegal, then some member of the board shall, without opening the envelope, mark across the face of the envelope, "rejected as illegal." The envelope and the ballot contained therein shall be preserved in the manner that official ballots voted are preserved.

(2) The board of county canvassers shall then open the covering envelope and record the ballot upon the poll book of the proper precinct in the same manner as clerks of elections record votes. The ballots for the entire county still in the plain sealed envelope shall be mixed up so as to make it impossible to determine which plain envelope came out of which signed

envelope. The vote of all absent electors shall be added to the total of the poll for the county.

(3) The supervisor or the chairman of the canvassing board shall, after the board convenes, have custody of the absent electors' ballots until a final proclamation is made as to the total vote received by each candidate."

101.691 — Eligibility for absentee voting

"(1) The following persons shall be entitled to cast an absentee ballot in any primary, special, or general election held in their respective election districts or precincts, subject to the conditions hereinafter set forth in this section:

(a) Members of the armed forces while in active service, their spouses and dependents, and service academy cadets.

(b) Members of the merchant marine of the United States, their spouses and dependents.

(c) Citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them.

(d) Members of religious groups or welfare agencies assisting members of the armed forces, who are officially attached to and serving with the armed forces, and their spouses and dependents.

(2) In order to cast an absentee ballot, the persons covered by this section must be otherwise eligible to vote."

APPENDIX D

ARTICLE V, Section 3 (b) of the Florida Constitution,

The Supreme Court:

"(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HENRY ESTEVA,
Plaintiff,

TCA 75-215

vs.

JAMES C. ADKINS, JR.,
et al.,
Defendants.

ORDER OF DISMISSAL

This matter is before the court on defendants' "Motion to Dismiss Or For Judgment On The Pleadings" filed December 22, 1975. Argument on the motion by learned counsel for the parties was heard on February 13, 1976. At the conclusion of the hearing, the court granted defendants' motion to dismiss and announced that a written order would follow.

Findings of Fact

1. The genesis of this action was an election to the office of judge of the Florida Second District Court of Appeal held on October 3, 1972, in which the contestants were Henry Esteva, plaintiff herein, and one Edward F. Boardman. Although Esteva received 404 more machine votes than did Boardman, the latter received 653 more absentee ballots, for an overall majority for Boardman of 249 votes.

2. Following the election, Esteva brought suit in the Circuit Court For The Second Judicial Circuit, seeking to have that state court declare him the winner of the election on the basis of the machine vote only and to have the election declared illegal in respect to the absentee ballots cast. The trial court granted summary judgment for Boardman, finding that of 1450 alleged flaws in the absentee ballots, only 88 set forth a valid basis for concluding that the ballots were illegal.

3. On appeal, the Florida First District Court of Appeal reversed, 299 So. 2d 633. Citing previous Florida decisions, the District Court concluded:

"Florida courts have long maintained and restated the principle that strict compliance with the statutory requirements for absentee voting is mandatory."

4. From this adverse decision, Boardman sought to invoke the conflict certiorari jurisdiction of the Florida Supreme Court. See Fla. Const., Article V, §3(b) (3). Finding its jurisdiction to have been properly invoked, the Florida Supreme Court heard the case and issued its opinion under the style of *Boardman* v. *Esteva*, 323 So. 2d 259 (Fla. 1975). The Florida Supreme Court reversed the decision of the First District Court of Appeal, the effect of which was to reinstate the decision of the trial court and to declare Mr. Boardman the winner of the contested election.

5. On December 3, 1975, Mr. Esteva initiated the instant action in this court, invoking the provisions of the Ninth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§1983 and 1985(3). Jurisdiction was alleged under 28 United States Code, §§1331 and 1343. On the merits, Mr. Esteva's claim was that the Florida Supreme Court lacked conflict jurisdiction over the action; that the decision of the Florida First District Court of Appeal declaring Mr. Esteva the winner of the election was final under the State Constitution; and that the effect of the Florida Supreme Court's taking jurisdiction and reversing the First District on the merits was to deprive Mr. Esteva, inter alia, of due process rights and the emoluments of office.

6. On January 6, 1976, the Florida Supreme Court denied a rehearing of its September 30, 1975 decision in *Boardman* v. *Esteva, supra*.

7. On January 7, 1976, Mr. Esteva filed with the Florida Supreme Court a Notice of Appeal to the Supreme Court of the United States.

Conclusions of Law

The court is of the opinion that it lacks jurisdiction to entertain this suit. Plaintiff has filed a notice of appeal to the

United States Supreme Court challenging the same decision of the Florida Supreme Court which is the basis of this lawsuit. The question presented here—whether the Florida Supreme Court in taking jurisdiction by "conflict certiorari" violated due process or equal protection guarantees—may be raised on that appeal or by certiorari. If in fact those guarantees were violated by the decision of the Florida Supreme Court in *Boardman* v. *Esteva, supra*, the remedy is reversal of that decision by the United States Supreme Court. See *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Moreover, even if an appeal were not presently pending to the United States Supreme Court, there is serious doubt that jurisdiction would lie in this court. It is deeply entrenched law that United States District Courts will not sit in direct review of state court decisions. *Aris* v. *Big Ten Taxi Corp.*, 441 F. 2d 536 (5 Cir. 1971). The avenue for review of such decisions is by way of appeal or certiorari directly to the United States Supreme Court. It is the court's opinion, after consideration of the arguments of able counsel, that a civil rights action which names the individual members of a Florida Supreme Court panel and essentially challenges the validity of that panel's decision must fall within the same prohibition. Were the rule otherwise, the District Courts would become courts of appellate review over state courts via the Civil Rights Acts.

It is recognized that the relief sought in this court differs from that available upon certiorari to the United States Supreme Court in that plaintiff here seeks damages against the individual panel members; such recovery, however, is barred by judicial immunity. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Cheramie* v. *Tucker*, 493 F. 2d 586 (5 Cir. 1974).

For the foregoing reasons, it is

ORDERED:

1. This case is dismissed for want of jurisdiction.

2. Defendants shall have their costs.

DONE AND ORDERED this 22nd day of February, 1976.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
APR 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM

No. 75-1279

HENRY ESTEVA,
Appellant

-vs-

EDWARD F. BOARDMAN,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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April 15, 1976

IN THE

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MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the grounds that this Court does not have jurisdiction to consider the questions here and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is a direct appeal from a unanimous final decision entered on September 30, 1975, rehearing denied on January 6, 1976, by the Supreme Court of Florida, which reversed a decision of the District Court of Appeal, First District of Florida, and which ordered reinstated a trial court final summary judgment in favor of Boardman. This decision

resolved the election contest by sustaining the election of Boardman.

Boardman was the certified winner of the election for a seat on the District Court of Appeal, Second District of Florida. Esteva, however, had a majority of the machine-cast ballots. This election contest was filed by Esteva to set aside the absentee ballots. Esteva filed suit in the Second Judicial Circuit of Florida, challenging various absentee ballots on a number of grounds, but not upon the federal grounds raised here.

Esteva's complaint did not raise the federal question posed by this appeal. In fact, his complaint merely alleges that the coding of ballots was not in conformity with required procedures under Section 101.68, Florida Statutes, and other unreferenced Florida Statutes. (Appendix A) In the Memorandum Brief in

Support of Plaintiff's (Esteva's) Motion for Summary Judgment, Esteva did not address the federal questions posed here. In fact, the questions raised by Esteva related only to the construction and requirements of Article VI, Section 1, of the Florida Constitution and Sections 101.041 and 101.68, Florida Statutes. (Appendix B)

No federal question is disclosed by the Final Summary Judgment. Quite clearly the trial court rejected the contentions that Article VI, Section 1, of the Florida Constitution and the Florida Statutes, including Section 101.68, rendered invalid the Hillsborough County absentee ballots. No federal question was even discussed by the trial court. (Appendix C)

In his assignments of error to the Final Summary Judgment, no federal

question was raised. The reference to *Papy v. Englander*, 267 So.2d 111 (Fla. 3rd D.C.A. 1972) indicates the statutory basis for the objection to the Hillsborough County absentee ballots. Again, no federal question was raised by Esteva's assignments of error. (Appendix D)

The District Court of Appeal, First District of Florida, in its opinion did not reach or deal with any such federal question, *Esteva v. Hindman*, 299 So.2d 633 (Fla. 1st D.C.A. 1974). The opinion of the Florida Supreme Court did not address or even discuss the federal questions posed here for the first time by Esteva, *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975). One would search the record in vain for reference to the federal questions posed by Esteva in this appeal.

Esteva contends violation of secrecy

of the ballot, but the coding system of absentee ballots in Hillsborough County ordered by the Circuit Court in Hillsborough County, could never result in the disclosure of a single vote, unless ordered by that Court with review available up to and including this Court. (See Court's order as an exhibit appended to Complaint filed by Esteva, p. 12-21.) No such order is in the record of this cause, nor is there any demonstration that the secrecy of the ballot was or will ever be in fact violated. There was no contention or affidavit to show any absentee voter was influenced in voting by the coding. The only purpose of the coding was an honest attempt to preserve the integrity of the absentee ballots in a very close election.

It should be noted that the trial court found a number of ballots to be

invalid and therefore sustained some objections made by Esteva. But, by and large, the objections were of a very technical and unsubstantial nature and they were rejected. (See trial court final summary judgment, original record, p. 794-803.) In so doing, the trial court sustained the "substantial compliance test". Nowhere in the record after the trial court's decision is Esteva's federal question 4 raised until this appeal. This federal question was not raised or ruled upon by the Florida Supreme Court.

The Constitution of the State of Florida vests appellate jurisdiction in the Supreme Court of Florida to review conflicting decisions of District Courts of Appeal of Florida, and decisions affecting the duties of classes of constitutional officers. Article V, Section 3(b), Florida Constitution. As the Petition for

a Writ of Certiorari to the District Court of Appeal, First District of Florida, discloses, there were nine separate bases for the exercise of conflict jurisdiction by the Florida Supreme Court. (Record in the Supreme Court, Index B, p. 1 - 15.) The concurring opinions to the decision of the Supreme Court illustrate the alternative bases for jurisdiction of the Supreme Court of Florida. *Boardman v. Esteva*, 323 So.2d 259, 270 (Fla. 1975).

Esteva has included statements, argument and the opinion of a Federal District Court suit not properly a part of this appeal. Boardman was not a party to that suit. Discussion of that case is entirely inappropriate and outside the record on this appeal. Whatever may be Esteva's appeal rights from the Federal District Court, they do not include raising points in this separate case.

The record discloses none of the federal questions raised here on appeal. The trial court treated the issue completely and responded to each objection of Esteva. The Supreme Court of Florida, in affirming the trial court's decision, resolved the conflict of the decisions around Florida and rendered uniform the rule of law in Florida.

ARGUMENT

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT.

Esteva claims jurisdiction by direct appeal under Title 28, United States Code, Section 1257(2), upon federal questions nos. 1 and 2 raised in the jurisdictional statement. Federal questions nos. 3 and 4 purport to authorize certiorari jurisdiction under United States Code, Section 1257(3).

A. No jurisdiction under Title 28, United States Code Section 1257,

is invoked by Esteva's Questions Nos. 1 and 2.

Esteva, for the first time in this matter, challenges the coding of the absentee ballots in Hillsborough County on federal grounds. For the first time in this cause, here in the jurisdictional statement, Esteva has raised an objection to the coding as being repugnant to Article IV, Section 4, of the United States Constitution and the Federal Absentee Voting Assistance Act of 1955, 50 United States Code, Section 1473.

Although the issue of secrecy of the absentee ballots has arisen in this cause as early as the complaint, the issues never involved a federal question. The challenge by Esteva apparent from the record is on the basis of Article VI, Section 1, of the Florida Constitution, and several Florida Statutes. The complaint raised only the objection that such

coding was not consistent with "Section 101.68 and other applicable Florida Statutes". (Appendix A) The Memorandum in Support of Plaintiff's Motion for Summary Judgment makes an objection based upon Article VI, Section 1, of the Florida Constitution, and Sections 101.041 and 101.68, Florida Statutes. (Appendix B) The trial court final summary judgment did not even discuss a federal question. (Appendix C) Esteva's assignments of error also do not raise a federal question. (Appendix D) Nowhere in the record is the coding challenged under Article IV, Section 4 of the United States Constitution or the Federal Absentee Voting Assistance Act of 1955, 50 United States Code, Section 1473.

It is well settled that some provision of the Federal Constitution, as distinguished from the state constitution,

must have been relied upon by the Appellant, and that that provision must have been set forth. *New York Central & N.R. Co. v. New York*, 186 U.S. 269 (1902); *Chapin v. Fye*, 179 U.S. 127 (1900); *Keokuh & Hamilton Bridge Co. v. Illinois*, 175 U.S. 626 (1900). Further, if the language is ambiguous as to the intention of court, it will be assumed that any references made to unconstitutionality is being made to the state constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928). Here there was not even an indefinite claim of repugnancy to the United States Constitution.

It is equally well established that a federal question may not be raised for the first time in the jurisdictional statement. *White River Lumber Company v. State ex rel. Appelegate*, 279 U.S. 692 (1929); *Whitney v. California*, 274 U.S. 357 (1925); and

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341 (1920). *Huffman v. Pursue, Ltd.*, 95 S.Ct. 1200 (1975), and *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), cited by Esteva as authority for jurisdiction here, each involved situations where a substantial federal question was raised earlier than in pleadings filed with this Court.

Esteva failed, through the entire proceedings in state court, to timely raise either federal question asserted here. It is only now, in his jurisdictional statement, that the federal question is framed. This comes too late to vest this Court with jurisdiction under Title 28, United States Code Section 1257. There is no basis for an appeal to or certiorari in the United States Supreme Court.

B. No jurisdiction under Title 28, United States Code Section 1257 is invoked by Esteva's

Questions Nos. 3 and 4.

Esteva asserts that this Court has jurisdiction to review the decision of the Supreme Court of Florida on the interpretation to be given to the Florida Constitution. Article V, Section 3(b)(3), provides in part:

> "May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction."

This is not a question of a judicial branch of state government invading exclusive federal jurisdiction as was the

case in *Local No. 438, et al. v. Curry*, 371 U.S. 542 (1962), and *International Union, et al. v. Russell*, 356 U.S. 634 (1957), cited by Esteva. There is no contention here that the judicial branch of Florida government could not have exercised jurisdiction, but only that its interpretation as to which of the appellate courts have this jurisdiction is in error. Most respectfully, this is solely and purely a question of interpretation and declaration of state law and not within the jurisdiction of the Supreme Court. *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927); *Quong Ham Wah Co. v. Industrial Acci. Commission*, 255 U.S. 445 (1921); and *Mt. St. Mary's Cemetery Assoc. v. Mullins*, 248 U.S. 501 (1919). This is also not the case of a complete denial of any remedy as in *Brinkerhoff-Faris Trust and Savings Co. v.*

Hill, 281 U.S. 673 (1930), cited by Esteva. Here, Esteva had three bites at the apple, he was not denied the taste. Clearly, the question of whether the Supreme Court of Florida has jurisdiction under the Florida Constitution is one solely and finally addressed to that Court. If jurisdiction were taken here, then potentially each case presented to the Florida Supreme Court by petition for writ of certiorari would be reviewable by this Court upon solely that basis. Such jurisdiction is not contemplated by Title 28, United States Code, Section 1257(3).

Esteva also asserts the Supreme Court of Florida violated prohibitions of the Fourteenth Amendment to the United States Constitution by "receding" from its earlier holding. This federal question was not raised during the proceedings in

state court. Although the issue could not have arisen until after the trial court's decision, Esteva did not raise this federal question of "retrospective and ambiguous law and a denial of rights under the Fourteenth Amendment to the United States Constitution". As argued above in Part A, it is too late to raise such issues in his jurisdictional statement. *White River Lumber Company v. State ex rel. Appelegate*, 279 U.S. 692 (1929). It is questionable whether the resolution of conflicting rules of law through the State of Florida is a denial of any federal right or subject to federal judicial jurisdiction.

II. THERE ARE NO SUBSTANTIAL QUESTIONS RAISED BY THE APPEAL.

The federal questions raised by Esteva are merely formal, void of merit and are not really in controversy. The constitutional questions presented are

therefore not substantial in character. Appellee respectfully submits that the Court should decline jurisdiction. *Zucht v. King*, 260 U.S. 174 (1922) and, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902).

As the Supreme Court of Florida noted, there is substantial doubt as to the standing of Esteva to complain of any violation of secrecy of the absentee ballots other than his own. He stands ready to disenfranchise all of the absentee voters of Hillsborough County although there is no showing that they desire to be disenfranchised. The right of secrecy of the ballot is personal to the voter himself. The privilege to vote absentee may not even be subject to the same measure of secrecy of the ballot as an ordinary machine ballot.

Most important is the fact that no

actual violation of the secrecy of the ballot has been shown to have occurred. The coding was to be controlled by Court order and not by election officials. Again, there was nothing more than an honest attempt to preserve the integrity of the ballots cast by absentee voters so that the mistakes of some would not disenfranchise all the absentee electors of an entire urban county.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this Court does not have the jurisdiction to entertain either an appeal or certiorari in this matter. Further, the questions if considered are so lacking in merit that they are unsubstantial and the Court should decline jurisdiction. The decision appealed should be affirmed or the appeal dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion to Dismiss or Affirm have been furnished via United States Mail to Leo L. Foster, Suite 608, Barnett Bank Building, Tallahassee, FL 32301, and Henry Esteva, 4510 Central Avenue, St. Petersburg, FL 33711, this 15th day of April, 1976.

_____
Attorney

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APPENDIX "A"

In addition to the above and foregoing defects, inadequacies, insufficiencies, violations of the law, numerous absentee ballots were received, counted and returns made thereon that were illegal and void for failure to comply with the requirements of law.

10.

The absentee ballots received, counted and returns made thereon and included in the totals aforesaid for Boardman which were void and invalid for the reasons hereinabove set forth in Paragraphs 8 and 9 are in excess of 600 and are in excess of the number required to change the result of the election.

11.

Plaintiff further alleges that in Hillsborough County absentee ballots with one or more of the defects, insufficiencies

and violations of law set forth in Paragraphs 8 and 9 were received, counted and returns made thereon. Plaintiff further alleges in respect to absentee ballots in said county that said absentee ballots were counted and returns made thereon in accordance with a certain order of Court entered by one of the Judges of the Circuit Court of Hillsborough County, Florida, in a case entitled Arnold D. Levine and Robert H. Mackenzie, Plaintiffs, vs. Nick Falsone, Ray Campo and James Sebesta, as the duly constituted Canvassing Board of Hillsborough County, Florida, Defendants, and being Case No. 213299, lately pending in said Court, copy of the Complaint in the case aforesaid being attached hereto as EXHIBIT 1 and made a part hereof by reference, and copy of Order entered by the Court as aforesaid being attached hereto as EXHIBIT 2 and made a part hereof

by reference, and copy of Motion and Certificate of Compliance with said Order being attached hereto as EXHIBIT 3 and made a part hereof by reference. Plaintiff alleges that the County Canvassing Board of Hillsborough County did not count the absentee ballots in the manner and by the method prescribed by Section 101.68 and other applicable Florida Statutes.

APPENDIX "B"

(b) THE VIOLATION BY ELECTION OFFICIALS OF THE SECRECY OF THE BALLOT. All elections by the people shall be by direct and secret vote. Article VI, §1, Fla. Con.

The secrecy of the ballot in Hillsborough County was violated by the official Canvassing Board pursuant to Circuit Court order entered in a suit in which one of the plaintiffs was Arnold D. Levine, Attorney for the defendant, Boardman, before the said Canvassing Board. (See copies of complaint and order attached to plaintiff's complaint)

F.S. 101.041 mandates secret voting and prohibits the counting of ballots except as prescribed:

> In all elections held...the voting is by secret official ballots, printed and distributed as provided by this Code, and no ballot shall be received or counted in any election except as prescribed by this Code....

And F.S. 101.68 directs the Canvassing Board to open the outer envelopes of

the absentee ballots to be counted and, before opening the inner blank envelopes containing the voted absentee ballot, to mix them up so as to preclude identification of an individual absentee ballot with its sender.

In the very recent case (October 6, 1972) the Third District Court of Appeal of Florida invalidated a similar attempt to violate the secrecy of the absentee ballot by Circuit Court order. The following is quoted from the opinion.

> By one (order) the Canvassing Board was ordered to open all absentee ballots received prior to 5:00 P.M. on Saturday, October 7 (being four days after the election) and to keep the envelopes and ballots together "so that it may be ascertained as to which ballot came from which envelope" (contrary to the provision of the statute above referred to which required the mixing of absentee ballots so as to prevent such disclosure).
>
> ...The later October 5 order

is erroneous in that it directs action by the Board contrary to the statutory requirement for anonymity of the absentee ballots

....

Papy v. Englander, 237 So.2d 111.

(c) THE FAILURE OF ELECTION OFFICIALS TO COMPLY WITH THE FLORIDA ELECTION CODE IN THE PERFORMANCE OF THEIR DUTIES.

None of the following employees in the Supervisor of Elections office/ in Lee County who performed the duties of deputy supervisor

APPENDIX "C"

(d) There are shown 16 in which the reason for voting absentee was not specifically indicated on the application and 79 in which such reason was not indicated on the return envelope. Each of these forms contains the five categories of persons who may vote absentee with instructions to "check appropriate reason". Failure to put a check mark into one or more of those designations is not deemed fatal to the validity of the ballot. The signature of the elector is adequate to at least certify that one or more of the reasons is applicable and in the case of the certificate on the return envelope it is under oath. Even if these are to be counted illegal they would not change the results.

(e) The other irregularities, such as address of attesting witness omitted,

post office cancellation stamp not affixed, vague identification of witnesses, failure of deputies to record oath, and the other discrepancies are not of vital consequence and may be attributed more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements. Fraud, corruption or gross negligence are completely absent.

(f) The plaintiff urges that all absentee votes of Hillsborough County, of which Esteva received 133 and Boardman 320, must be suppressed because they were counted and returns made in accordance with an injunction order of the Circuit Court of Hillsborough County in the case of Levine, et al v. Falsone, et al, constituting the Canvass Board, Case No. 213299. It is contended that such procedure ordered by the Court violated F.S.

101.68 and other statutes and breached the fundamental requirement of secrecy. This Court does not interpret the Hillsborough Circuit

Court order as having that effect and has not overlooked Papy v. Englanger, Fla. App. (Third) 267 So. 2d 111. However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order, and will make no judgment except to approve the obedience of the election officials to its commands, and to accept their returns pursuant thereto.

3. Since the Rinehart cases (State ex rel Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 and Rinehart v. State ex rel Whitley, 145 Fla. 612, 200 So. 218), the courts of Florida have observed the rule that absentee voting laws, being in

derogation of the common law,[1] should be strictly construed for the reason that the purity of the ballot is more difficult to preserve when voting absent than when voting in person. It was also observed in the first Rinehart case that absentee voting was not in the minds of the makers of the Constitution when that instrument was cast. In the second case, it was held that when some absentee votes were illegal and were of sufficient number to affect the outcome of the election and were commingled with the other ballots, then none would be counted and the election results would be declared on the votes cast personally by machine or otherwise in the voting places. It is to be observed that in Rinehart there were votes cast pursuant to Chapter 16986, Acts of 1935, which was declared unconstitutional, which should not be counted, and that there was

positive evidence that there were ballots cast within the state by persons who were present the day of the election and were thus not eligible to vote absentee. The facts in that case were much stronger than in the case before this Court. The cases of Frick v. State, 160 Fla. 394, 35 So.2d 10 and Griffin v. Knoth, 67 So.2d 431, recognized the Rinehart

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[1] There are precious little voting of any kind at common law.

APPENDIX "D"

COURT'S FAILURE TO FOLLOW RULE OF TOTAL REJECTION IF VOIDS EXCEED MARGIN

3. The Court committed prejudicial error in the judicial act of failing to follow the law, long established and often reaffirmed by the Florida Supreme Court, that where there are more invalid absentee ballots that should not have been counted for failure of compliance with mandatory requirements of the absentee voting statute, that all absentee ballots cast in the election must be disregarded and the election decided on the machine vote.

COURT'S ERROR IN CONTENDING THAT "LEGISLATURE NEVER INTENDED STRICT COMPLIANCE"

4. The Court committed prejudicial error in the judicial act of indicating in the last sentence of Paragraph 7 of the Final Summary Judgment that the legislature never intended rigid adherence to mandatory

requirements of the absentee voting statute.

COURT'S ERROR IN OVERLOOKING THE ORGANIC LAW WHICH VOIDS ALL BALLOTS WHICH ARE NOT SECRET BALLOTS

5. The Court committed prejudicial error and failed to comprehend its function in failing to invalidate the absentee ballots cast in Hillsborough County whereby the Circuit Court for Hillsborough County violated the organic requirement of secrecy. The Court opined... "However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order ...".

COURT'S ERROR IN OVERLOOKING FACT THAT APPELLEE BOARDMAN WAS RESPONSIBLE FOR INSTIGATING AND PARTICIPATING IN THE VIOLATION OF THE ORGANIC LAW OF SECRECY

6. The Court committed prejudicial error in the judicial act of acknowledging but of refusing to follow in Paragraph 2(b) of the Final Summary Judgment basic law as

enunciated in the case of Papy v. Englander, 267 So. 2d 111, and refusing to invalidate all absentee ballots cast in the election in Hillsborough County where the record showed that the basic constitutional and statutory imperative of secrecy of the ballot was violated by wrongful judicial proceedings instigated and participated in by the appellee, Boardman, and/or his duly authorized attorney and representatives.